Mohd Nazir bin Badar Shair v Timbalan Menteri Dalam Negeri

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO 44–43 OF 1999
AUGUSTINE PAUL J
24 MARCH 2000

Administrative Law *— Remedies — Habeas corpus — Application for habeas corpus — Affidavits in reply — Jurats, positioning of — Indorsement under O 41 r 9(2) of Rules of the High Court 1980, effect of — Rules of the High Court 1980 O 41 r 9(2)*

Criminal Procedure *— Habeas corpus — Proper procedure — Affidavit filed by mother of detainee — Difficulty or inconvenience in getting detainee to affirm affidavit — Whether would amount to 'other sufficient cause' under s 367 of CPC — Whether positive proof of difficulty, inconvenience and financial inability in detainee to affirm affidavit shown — Criminal Procedure Code s 367*

Evidence *— Affidavit — Defects in affidavits — Indorsement on affidavits not stating dates of swearing and filing of affidavits — No application for leave of court to use affidavits — Whether affidavits could be used*

Evidence *— Affidavit — Defects in affidavits — Jurat commencing on page where substantive part of affidavit ended and concluding on fresh page — Jurat beginning on completely new page — Jurat to affidavits not entitled — Whether affidavits regular*

Evidence *— Presumption — Official acts — Affirmation and filing of affidavits — Whether constituting official acts under s 114 illus (e) — Evidence Act 1950*

The applicant motioned for a writ of habeas corpus against the respondents. His motion was supported by an affidavit affirmed by his mother, one Che Ton bte Judin. The respondents filed a total of 11 affidavits in support of their case. At the hearing of the motion, counsel for the applicant raised a preliminary objection to the effect that three of the affidavits filed by the respondents were defective as the jurats were not properly placed. The facts revealed that in the case of two of those affidavits, the jurat began on the page where the substantive part of the affidavit ended and concluded on a fresh page whereas in the third affidavit, the jurat was on a completely new page. The senior federal counsel for the respondents, contended that the Rules of the High Court 1980 ('the RHC') do not say that the whole jurat must be on the same page and raised a preliminary objection himself against the affidavit in support of the applicant's motion. According to the senior federal counsel, the affidavit affirmed by the applicant's mother did not comply with the requirements of s 367 of the Criminal Procedure Code ('CPC').

Held, dismissing the applicant's preliminary objection, allowing the respondents' preliminary objection and dismissing the applicant's motion:

(1) The reasons advanced for the ruling in *Voon Mow Chen v Menteri Dalam Negeri & Anor* [1993] 4 CLJ 195 that the jurat must not be on a new page cannot be sustained. The first reason that it may not be a sufficient indication that the jurat relates directly to the deposition cannot be sustained as the whole affidavit including the jurat is stapled together and filed which is sufficient indication that the jurat does, in fact, relate to the deposition. The second reason relating to the possible use of pre-executed jurats, if stretched a bit further, may give rise to the possibility that the extra space left in order to ensure a jurat does not commence on a new page can be subsequently filled up. There is no provision in the RHC on the positioning of the jurat as being defective if it does not end on the last page of an affidavit. In fact, the indorsement required under O 41 r 9(2) of the RHC at the end of the jurat shows that the jurat, even though beginning and ending on a new page or is completely on a new page, relates to the deposition in question and that the affidavit is regular (see p 565A–D, F).

(2) The affirmation and filing of an affidavit are official acts which attract s 114(e) of the Evidence Act 1950. The signature of a commissioner for oaths in an affidavit showing that it has been sworn before him is an official act and the affidavit must be presumed to have been regularly affirmed even though the jurat is on a completely new page unless the contrary is proved. The filing of an affidavit by a solicitor's firm or a government agency also amounts to an official act of a solicitor or a government agency and it must be presumed that the jurat, even though on a new page, relates to the affidavit in question unless the contrary is proved (see p 565F–G, 566A–C).

(3) The fact that the jurat commences on one page and ends on another or that it is on a completely new page will not render the affidavit defective unless there is evidence to the contrary. There is also no requirement in O 41 r 1 of the RHC or in Form 78 of the RHC for the jurat to be entitled. On the facts, the three affidavits must be presumed to be regular. However the indorsements on all three affidavits were defective as the indorsements did not state the dates of swearing and filing of the affidavits. The respondents also failed to apply for leave to use the affidavits and the court was thus compelled to order that the affidavits could not be used (see p 566G–H, 567A).

(4) The difficulty or inconvenience of getting a detainee to affirm the affidavit would fall within the words 'other sufficient cause' in s 367 of the CPC as it is something that is out of his control or influence. As s 367 is an exception to the general rule that an affidavit in support of an habeas corpus application must be affirmed by a detainee himself, the section must be strictly construed. There must be positive proof of difficulty, inconvenience and financial inability in the detainee himself

affirming the affidavit instead of a mere possibility as was deposed to in the instant case. On the facts, the reasons advanced by the applicant's mother to explain why she had to affirm the affidavit did not satisfy the requirements of the section. The indorsement to the affidavit was also defective as it did not show the dates of swearing and filing it and no application was made for leave of court to use it. Hence there was no affidavit to support the motion (see p 568A–B, E, G–H).

[Bahasa Malaysia summary

Pemohon telah memohon usul untuk writ habeas corpus terhadap responden-responden. Usulnya disokong oleh afidavit yang diikrarkan oleh ibunya, seorang bernama Che Ton bte Judin. Responden-responden telah memfailkan sebanyak 11 afidavit untuk menyokong kes mereka. Di pembicaraan usul, peguam bagi pihak pemohon membangkitkan bantahan permulaan bahawa tiga afidavit yang difailkan oleh responden-responden tidak sempurna kerana jurat-jurat tidak terletak pada tempat yang betul. Fakta-fakta menunjukkan bahawa dalam dua afidavit tersebut, jurat bermula pada halaman di mana bahagian substantif afidavit berakhir dan tamat pada halaman baru manakala dalam afidavit ketiga, jurat bermula pada halaman yang baru. Peguam kanan persekutuan, bagi pihak responden-responden, berhujah bahawa Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') tidak menyatakan bahawa keseluruhan jurat mesti terletak pada halaman yang sama dan beliau sendiri membangkitkan bantahan permulaan terhadap afidavit yang menyokong usul pemohon. Menurut peguam kanan persekutuan, afidavit yang diikrarkan oleh ibu pemohon tidak mematuhi keperluan-keperluan s 367 Kanun Acara Jenayah ('KAJ').

Diputuskan, menolak bantahan permulaan pemohon, membenarkan bantahan permulaan responden dan menolak usul pemohon:

(1) Alasan-alasan yang dikemukakan untuk keputusan dalam *Voon Mow Chen v Menteri Dalam Negeri & Anor* [1993] 4 CLJ 195 bahawa jurat tidak boleh bermula pada halaman yang baru tidak boleh dikekalkan. Alasan pertama bahawa ia tidak mungkin menunjukkan dengan secukupnya jurat tersebut adalah berkaitan secara langsung kepada disposisi tidak boleh dikekalkan kerana keseluruhan afidavit termasuk jurat diikat bersama dan difailkan yang menunjukkan dengan sepenuhnya bahawa pada hakikatnya jurat memang berkaitan dengan sumpah tersebut. Alasan kedua berhubung dengan kemungkinan penggunaan jurat yang belum terlaksana, andainya difikirkan dengan mendalam, mungkin membangkitkan kebarangkalian bahawa ruang yang dibiarkan supaya memastikan jurat tidak bermula pada halaman yang baru boleh diisikan pada masa yang kemudiannya. Tiada apa-apa peruntukan dalam KMT mengenai kedudukan jurat sebagai kurang sempurna sekiranya ia tidak berakhir pada halaman akhir

sesuatu. Pada hakikatnya, indorsemen yang dikehendaki di bawah A 41 r 9(2) KMT di akhir jurat menunjukkan bahawa jurat tersebut, walaupun ia bermula dan berakhir pada halaman baru atau terletak pada halaman baru sama sekali, adalah berkaitan dengan disposisi yang berkenaan dan bahawa afidavit tersebut adalah mengikut aturan (lihat ms 565A–D, F). A B

(2) Pengesahan dan pemfailan suatu afidavit merupakan tindakan rasmi yang tertakluk kepada s 114(e) Akta Keterangan 1950. Tandatangan seseorang Pesuruhjaya Sumpah dalam suatu afidavit yang menunjukkan bahawa ia telah diikrarkan di hadapannya adalah tindakan rasmi dan afidavit itu mestilah dianggap telah diikrarkan dengan sempurna meskipun jurat terletak pada satu halaman yang baru melainkan keadaan sebaliknya. Pemfailan afidavit oleh firma peguamcara atau ejensi kerajaan juga merupakan suatu tindakan rasmi oleh peguamcara atau ejensi kerajaan dan ia mestilah dianggap bahawa jurat tersebut, walaupun bermula pada halaman yang baru, dan adalah berkaitan dengan afidavit yang berkenaan melainkan keadaan sebaliknya terbukti (lihat ms 565F–G, 566A–C). C D

(3) Hakikat bahawa jurat tersebut bermula pada satu halaman dan berakhir pada halaman lain atau bahawa ia adalah pada halaman yang baru sama sekali tidak akan menyebabkan afidavit tersebut kurang sempurna melainkan terdapat keterangan yang sebaliknya. Tidak juga terdapat keperluan dalam A 41 k 1 KMT atau dalam Borang 78 KMT yang menghendaki jurat mempunyai tajuk. Atas fakta-fakta, tiga afidavit itu mestilah dianggap mengikut aturan. Namun demikian, indorsemen pada ketiga-tiga afidavit adalah kurang sempurna kerana mereka tidak menyatakan tarikh mengangkat sumpah dan pemfailan afidavit-afidavit. Responden-responden juga gagal untuk memohon kebenaran menggunakan afidavit-afidavit tersebut dan dengan itu mahkamah wajib memerintah bahawa afidavit-afidavit tersebut tidak boleh digunakan (lihat ms 566G–H, 567A). E F

(4) Kesulitan dalam mendapatkan seseorang tahanan untuk mengikrar afidavit dirangkumi oleh perkataan-perkataan 'other sufficient cause' dalam s 367 KAJ kerana ia adalah sesuatu di luar kawalan atau pengaruhnya. Oleh kerana s 367 adalah satu kekecualian kepada rukun am bahawa suatu afidavit yang menyokong permohonan habeas corpus hendaklah diikrarkan oleh orang tahanan sendiri, seksyen tersebut mestilah ditafsirkan secara ketat. Mesti terdapatnya bukti positif mengenai kesukaran, kesulitan dan ketidakmampuan kewangan dalam tahanan sendiri mengikrarkan afidavit dan bukannya kemungkinan semata-mata seperti yang diikrarkan dalam kes ini. Berdasarkan fakta-fakta, alasan-alasan yang dikemukakan oleh ibu pemohon untuk menjelaskan mengapa beliau harus mengikrar afidavit tersebut tidak memenuhi keperluan-keperluan seksyen tersebut. Indorsemen kepada afidavit tersebut juga tidak sempurna kerana G H I

ia tidak menunjukkan tarikh sumpah diambil dan pemfailannya dan tiada permohonan telah dibuat untuk kebenaran daripada mahkamah bagi menggunakannya. Dengan itu, tiada apa-apa afidavit untuk menyokong usul tersebut (lihat ms 568A–B, E, G–H).]

Notes

For cases on habeas corpus, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) and 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 390–437 and 1505–1572 respectively.

For a case on defects in affidavits, see 7 *Mallal's Digest* (4th Ed, 1998 Reissue) para 173.

For cases on presumption generally, see 7 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1591–1679.

Cases referred to

Commissioners of the Municipality of Malacca v Sinniah [1974] 1 MLJ 77 (refd)

Han Euu Tiam v Phang Kui Fatt & Ors [1999] 4 MLJ 683 (refd)

Jugraj Singh & Anor v Jaswant Singh & Ors AIR 1971 SC 761 (refd)

Kassim bin Sulong & Anor v Guthrie Estates Holdings Ltd & Ors [1993] 3 MLJ 303 (refd)

Lim Bua v Ng Kian Heng [1993] 2 CLJ 461 (refd)

Lim Yew Sing v Hummel International Sports & Leisure A/S [1996] 3 MLJ 7 (refd)

Syed Ali bin Mohamed Kutti v Menteri Dalam Negeri Malaysia & Anor [1998] 2 J Cr 449 (refd)

Voon Mow Chen v Menteri Dalam Negeri & Anor [1993] 4 CLJ 195 (refd)

Wan Othman bin Datuk Wan Yusuf v Kewangan Utama (M) Bhd [1993] 2 CLJ 572 (refd)

Zamrud Properties Sdn Bhd v Pang Mooi Gaid & Anor [1999] 5 MLJ 180 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 367

Evidence Act 1950 s 114(e)

Rules of the High Court 1980 O 41 r 1, O 41 r 5, O 41 r 9(2), Form 78

Tabian bin Tahir (*Tabian Tahir & Co*) for the applicant.

Kamaludin bin Md Said (Senior Federal Counsel, Ministry of Home Affairs) for the respondents.

Augustine Paul J: This is a motion for a writ of habeas corpus filed by Mohd Nazir bin Badar Shair ('the applicant') against the three respondents. The motion was supported by an affidavit affirmed by the applicantís mother, one Che Ton bte Judin. The respondents filed a total of 11 affidavits in support of their case.

When the motion was called up for hearing before me on 13 March 2000 learned counsel for the applicant raised a preliminary objection to the effect that three of the affidavits filed by the respondents were defective as the jurats were not properly placed. The three affidavits are encls 12, 13 and 17 of the court file. In support of his objection he relied on the case of *Voon Mow Chen v Menteri Dalam Negeri & Anor* [1993] 4 CLJ 195. In his reply the learned senior federal counsel contended that the Rules of the High Court 1980 ('the RHC') do not say that the whole jurat must be on the same page. He then proceeded to raise a preliminary objection himself with respect to the affidavit filed in support of the motion. He referred to the case of *Syed Ali bin Mohamed Kutti v Menteri Dalam Negeri Malaysia & Anor* [1998] 2 J Cr 449 and contended that the affidavit affirmed by the applicantís mother does not comply with the requirements of s 367 of the Criminal Procedure Code (FMS Cap 6).

I shall first deal with the objection raised by the applicant. In the case of encls12 and 17 the jurat begins on the page where the substantive part of the affidavit ends and concludes on a fresh page. In the case of encl 13 the jurat is on a completely new page. This, as contended by learned counsel for the applicant, offends the proposition laid down in *Voon Mow Chen* where Vincent Ng JC (as he then was) said at p 198:

> It is this court's view that the reason that the jurat of an affidavit should not begin and end on a fresh page but rather should immediately follow the end of a substantive or spill-over of the last substantive averment of the deposition, is in order to ensure that there is sufficient indication that the jurat relates directly to the deposition. This is also in order to obviate the possibility of abuse by any party who may pre-execute jurats of affidavits in the absence of any averments for attachment to subsequently prepared averments. On account of this, it was held in the case of *Amanah International Finance Bhd v Thien Juk Cheung & Ors* Suit No KG 392 of 1986 (High Court Kuching, Haidar J) 4 September 1989 that the affidavit of X was defective as the jurat of the affidavit began and ended on a fresh page and did not follow immediately after the end of the deposition. I wholly agree and subscribe to the ratio in this case and I hold to be defective, such similar affidavits filed by the respondent here.

It is my view that it is the ratio of this ruling, that is to say, that the jurat of an affidavit should not begin and end on a fresh page, which would compel a person to ensure that the jurat begins immediately after the end of the substantive part of the affidavit notwithstanding the part of the page where it ends. In such circumstances there is every possibility that the jurat will spill over onto the next page as has happened in this case in encls 12 and 17. If this is also to be penalized a person who drafts an affidavit will have to take meticulous care to ensure that the substantive part of the affidavit ends at the top of the last page so as to leave sufficient space on the same page to accommodate the whole jurat. Thus a drafter may find himself in the unenviable position of adding additional, though irrelevant, material to his affidavit or removing matters that are relevant in order to make room for the jurat. Alternatively, he may land up using up precious time in adjusting the spacing of the various paragraphs of his affidavit so as not fall foul of the law. It may be comparatively easier to achieve this result with a word processor.

But it must be remembered there are still many, particularly the petition writers, who use typewriters to prepare affidavits. They will end up retyping an affidavit several times in order to ensure that the jurat is not on a new page. It is superfluous to reiterate the technical and practical problems that such an exercise will entail. The first reason advanced in *Voon Mow Chen* for the ruling that the jurat must not be on a new page is that it may not be a sufficient indication that the jurat relates directly to the deposition. This, to my mind, cannot be sustained as the whole affidavit including the jurat is stapled together and filed which would be sufficient indication that the jurat does, in fact, relate to the deposition. The second reason advanced in *Voon Mow Chen* relates to the possible use of pre-executed jurats to subsequent affidavits. If this argument is stretched a bit further then just as there may be a possibility of pre-executed jurats being used for subsequent affidavits it is equally possible that the extra space left in order to ensure that a jurat does not commence on a new page can be subsequently filled up. There will be no end to such possibilities. It is my view that rulings must be made on evidence and not on mere possibilities. Alternatively, a ruling must be based on what is expressly provided or prohibited by the RHC. There is no provision in the RHC on the positioning of the jurat with the result that there is no legal basis for declaring a jurat as being defective if it does not end on the last page of an affidavit. Notwithstanding what I have said the difficulties envisaged in *Voon Mow Chen* have in fact been resolved by O 41 r 9(2) of the RHC which reads as follows:

> Every affidavit must be indorsed with a note showing on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not so indorsed may not be filed or used without the leave of the court.

The indorsement must be made at the end of the jurat. This will show that the jurat, even though beginning and ending on a new page or is on a completely new page, relates to the deposition in question and that the affidavit is regular. It is my view that the object of the indorsement is precisely for that purpose thereby negating the problems alluded to thusfar.

Be that as it may, the affirmation and filing of an affidavit are official acts which will attract s 114(e) of the Evidence Act 1950 which provides that the court may presume that judicial and official acts have been regularly performed. The words 'regularly performed' in the section means correctly done (see *Commissioners of the Municipality of Malacca v Sinniah* [1974] 1 MLJ 77). Further, as Richard Talalla J said in *Lim Bua v Ng Kian Heng* [1993] 2 CLJ 461 at p 462:

> Section 114 of the Evidence Act ('the Act') with its illustration (e) provides that the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case and that judicial and official acts have been regularly performed. The illustration constitutes an application of the maxim *omnia praesumuntur rite esse acta* that is all acts are presumed to have been rightly and regularly done. As stated in *Sarkar on Evidence* (13th Ed) at p 1037, the foundation for the maxim is that every person whether in his private or official character, does his duty and unless the contrary is proved, it is presumed that all things are rightly and regularly done.

The signature of a commissioner for oaths in an affidavit showing that it has been sworn before him is an official act and the affidavit must be presumed to have been regularly affirmed even though the jurat is on a completely new page unless the contrary is proved. Thus in *Jugraj Singh & Anor v Jaswant Singh & Ors* AIR 1971 SC 761, it was held that the endorsement of a notary public that a power of attorney had been subscribed and sworn before him raises the presumption that he must have satisfied himself in the discharge of his official duties that the person executing it is the proper person. Furthermore, the different pages of an affidavit including the jurat, whether it is on a new page or not, are stapled together and usually filed by a solicitor's firm or a government agency as in this case. It amounts to an official act of a solicitor or the government agency concerned. So it must be presumed that the jurat, even though on a new page, relates to the affidavit in question unless the contrary is proved.

One further matter that requires consideration is whether a jurat must carry with it the title of the action pursuant to the judgment in *Han Euu Tiam v Phang Kui Fatt & Ors* [1999] 4 MLJ 683. If it is so then the affidavits in this case will be defective as they do not have the title. In *Han Euu Tiam* it was held that the jurat must have the title of the action by virtue of the presence of the words '(*Title as in action*)' appearing at the top of Form 78 of the RHC. In my opinion the need to incorporate the title of the action in the jurat is guided by the heading of Form 78 of the RHC itself which reads as follows:

> FORMS OF JURAT (O 41 r 1)

The presence of the words in brackets means that the forms provided have in contemplation the whole of O 41 r 1 of the RHC. Thus the rule must be read as a whole in order to determine whether the words '(*Title as in action*)' refer to the jurat or the affidavit itself. In this regard the part of O 41 r 1 that warrants consideration is sub-r (1) which reads as follows:

> Subject to paras (2) and (3), every affidavit sworn in a cause or matter must be entitled in that cause or matter.

This is the only part of O 41 r 1 of the RHC which makes reference to the title of the cause or matter. As Form 78 relates to the whole of O 41 r 1 of the RHC it must be read together with the sub-rule. It follows that the words '(*Title as in action*)'relate to the affidavit. Thus what must carry the title of the action is the affidavit and not the jurat.

Thus I hold, and with respect, that the fact that the jurat commences on one page and ends on another or that it is on a completely new page does not render the affidavit defective unless there is evidence to the contrary. I also hold, and with respect, that there is no requirement in O 41 r 1 of the RHC or in Form 78 for the jurat to be entitled. Accordingly, I must presume that the three affidavits in question are regular. However, the indorsement required by O 41 r 9(2) of the RHC in all the three affidavits is in the following form:

> Afidavit ini difailkan oleh Peguam Kanan Persekutuan bagi pihak responden-responden yang beralamat di Pejabat Peguam Kanan Persekutuan, Kementerian Dalam Negeri, Jalan Dato Onn, 50546 Kuala Lumpur.

A This indorsement is defective as it does not state the dates of swearing and filing of the affidavits. However, as provided by the rule referred to the affidavits, even though defective, may be used with leave of court. But no application has been made by the Respondents for leave to use the affidavits. That compels me to orderthat the affidavits cannot be used.

B I shall now deal with the objection raised by the learned Senior Federal Counsel. It is based on s 367 of the Criminal Procedure Code ('the section') which reads as follows:

> The affidavit required by the last preceding section shall be made by the person detained or alleged to be detained unless it be shown that by reason of restraint or coercion or other sufficient cause he is unable to make it, in which
C case it shall be made by some other person.

In this case the affidavit in support of the motion was affirmed by the mother of the applicant. In explaining why she had to affirm the affidavit she said in para 3:

> Izinkan saya menerangkan di sini bahawa afidavit ini telah diikrarkan oleh saya
D dan bukannya pemohon memandangkan pemohon kini sedang ditahan di Pusat Pemulihan Simpang Rengam, Johor di mana sekiranya pemohon mesti dan/atau mengikrarkan Afidavit ini, kesulitan and kelewatan akan timbul untuk membawa pesuruhjaya sumpah ke pusat pemulihan tersebut kerana ia bukanlah suatu tempat bebas dan ini melibatkan kes (sic) yang besar dan tidak termampu oleh saya untuk saya yang tidak berkerja ini.

E In *Syed Ali bin Mohamed Kutti* the affidavit in support of the motion was affirmed by the father of the detainee on the ground that it was difficult or inconvenient to bring a magistrate or a commissioner for oaths to the detention centre.

> ... in rejecting the reason advanced Abdul Wahab Patail J said at p 452 that in
F the context of s 367 the word 'sufficient'qualifying 'cause' as used, that is, after the words 'by reason of restraint or coercion', must be intended to mean some cause that is out of the control or influence of the applicant. That it is difficult or inconvenient is not therefore a sufficient cause. It must be shown that at least it is impractical or unreasonable to expect it of the applicant. The reason that it is difficult or inconvenient given in the supporting affidavit by
G the father cannot be accepted and the application must fail.

His Lordship then proceeded to say that even if difficulty or inconvenience is accepted as a 'sufficient cause' then there is nothing in the affidavit

> ... to say that for example, the deponent had tried to bring a magistrate or a commissioner for oaths but they had refused or that they required such fees or
H expenses as are unreasonable or impracticable. In the circumstances, the deponent has failed to show evidence of difficulty or inconvenience to support his assertion so as to allow the deponent's affidavit to be used under s 367 to support the habeas corpus application. Having so failed, the deponent's affidavit cannot be used as supporting affidavit and the application must also on this ground fail.

I I fully agree with the view expressed by Abdul Wahab Patail J that the words 'sufficient cause' appearing in the section must be interpreted to mean '... some cause that is out of the control or influence of the applicant'. This is

because the phrase 'sufficient cause'is preceded by the word 'other' which, on the application of the ejusdem generis rule of construction, must be interpreted in line with the phrase 'restraint or coercion'. The latter phrase refers to something that is out of the control or influence of a detainee and thus the words 'other sufficient cause' must be given a similar meaning. However, I take the affirmative view that difficulty or inconvenience of getting a detainee to affirm the affidavit would fall within the words 'other sufficient cause' as it is something that is out of his control or influence. But I wholly agree with the learned judge's views that there must be positive evidence of the difficulty and inconvenience. I say this because the contents of an affidavit prepared by a person other than a detainee will contain hearsay material. Pursuant to O 41 r 5 of the RHC information which is not within the personal knowledge of a deponent is allowed only when an affidavit is affirmed for an interlocutory proceeding and not when a final order is sought (see *Wan Othman bin Datuk Wan Yusuf v Kewangan Utama (M) Bhd* [1993] 2 CLJ 572; *Kassim bin Sulong & Anor v Guthrie Estates Holdings Ltd & Ors* [1993] 3 MLJ 303; *Zamrud Properties Sdn Bhd v Pang Mooi Gaid & Anor* [1999] 5 MLJ 180). Where there is an application for a final order it is fatal to rely on affidavits containing hearsay evidence (see *Lim Yew Sing v Hummel International Sports & Leisure A/S* [1996] 3 MLJ 7). As an application for habeas corpus is final in nature the affidavit in support must not contain hearsay material. Ordinarily, therefore, an affidavit in support of an application for habeas corpus must be affirmed by a detainee himself. However, this rule has been modified in the case of habeas corpus applications by the section which permits persons other than a detainee to affirm affidavits in view of difficulties that may be encountered thus permitting such affidavits to contain hearsay material. As the section is an exception to the general rule it must be strictly construed. This view is supported by the use of the word 'shown' in the phrase 'unless it be shown' appearing in the section which is a reference to proof. In saying this, I refer to *Black's Law Dictionary* (7th Ed) which defines the word 'show' as:

> To make (facts, etc) apparent or clear by evidence; to prove.

Thus there must be positive proof of difficulty, inconvenience and financial inability in the detainee himself affirming the affidavit instead of a mere possibility as deposed to in this case. As the reasons advanced by the applicant's mother to explain why she had to affirm the affidavit do not satisfy the requirements of the section I am unable to accept it. Furthermore, the indorsement to the affidavit is defective as it does not show the dates of swearing and filing it. No application was made for leave of court to use the affidavit. Again the affidavit cannot thus be used. The motion is therefore left without any affidavit to support it.

In the opshot I dismiss the motion.

Applicant's preliminary objection and motion dismissed, respondent's preliminary objection dismissed.

Reported by Andrew Christopher Simon